marketable, competitive programming packages. An operator's decisions regarding channel assignment should be considered unjust or unreasonable only if a complainant makes the *prima facie* discrimination showing set forth above and the operator cannot rebut that showing. Operators must be given flexibility to select their channels from the total base of channels to the extent necessary to provide programming packages that can compete with those offered by incumbent cable operators.

To afford the essential business flexibility described in the foregoing paragraphs, the Commission's rules or its interpretation of its rules should, when demand exceeds capacity, permit operators to select programming for any one-third of the activated channels to the extent necessary to compete effectively with incumbent cable operators. Congress did not distinguish between analog and digital channels for this purpose. Neither should the Commission.

6. Channel Positioning[36]

Operators must be permitted to assign channel positions as necessary to meet consumers' expectations and facilitate the marketing of competitive packages, as well as to meet channel positioning requirements for must-carry stations, satisfy the varied requirements of video programming providers, and deal with technological limitations. An operator's decisions regarding channel position should be considered unjust or unreasonable only if a complainant makes the *prima facie* discrimination showing set forth above and the operator cannot rebut that showing.

[36] Id. ¶ 22.

7. Changes In Demand/Capacity[37]

Operators must be permitted to handle changes in demand after the initial assignment of a system's capacity in a manner that does not disrupt service. The Commission should not prescribe any specific approach, but should permit operators to accommodate such changes in any reasonable manner. If excess demand materializes, an operator should be given a reasonable period of time to accommodate the demand. For example, if carriage is offered on fixed duration contracts (*e.g.*, 5 years), then a reasonable period of time would be until the next anniversary of those contracts. Otherwise, prospective operators will not be assured of being able to meet customers' expectations of reasonably stable programming packages.

The Commission should not prescribe specific procedures for the assignment of added or newly available capacity. Such procedures should be left in the first instance to the business judgment of the operator exercised in light of Section 653's prohibition of unreasonable discrimination.

8. Marketing Programming Selected By Others[38]

The Commission correctly concludes that Section 653(b)(1)(B) permits operators to market directly to customers any or all of the programming selected by unaffiliated video programming providers. As noted previously, Congress focused on enabling open video systems to compete effectively with incumbent

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[37] Id. ¶¶ 25-26.

[38] Id. ¶ 27.

cable operators and accordingly stated its intent not to limit the number of channels of programming an operator may offer to provide to customers. This freedom to market packages of programming - including programming selected by others - will help to make open video systems competitively viable.

B. Rates, Terms and Conditions of Carriage[39]

That open video systems are not to be regulated as common carrier services means, among other things, that the Commission is precluded from using Title II-like regulations to enforce the requirement that prices, terms, and conditions for carriage be just and reasonable. Thus, the Commission can neither require the filing of tariffs or the comparable publication of contracts with video programming providers nor promulgate detailed rules governing pricing.

The Joint Parties strongly oppose any requirement that they be required to make their contracts public. Such a requirement would amount to a backdoor imposition of Title II-like public tariff requirements on open video system operators. This tentative conclusion is inconsistent with the 1996 Act's requirement that open video system operators as new entrants be subject to lesser regulatory burdens than incumbent cable operators, and it directly contradicts repeated Commission findings that public rate filings in competitive markets lead to price coordination and are not in the public interest.[40] In the Notice of Proposed Rulemaking in CC Docket No. 96-61, the Commission has

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[39] Id. ¶¶ 28-34.

[40] *Notice of Proposed Rulemaking* (FCC 96-123), *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, released March 25, 1996, ¶ 34.

tentatively concluded that tariff filings for non-dominant interexchange carriers (including AT&T) are not necessary to ensure that charges and practices of those carriers are just, reasonable, and not unreasonably discriminatory.[41] That notice also restates the Commission's earlier finding "that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act."[42] Similarly, competitive market forces will operate to ensure reasonable rates, terms, and conditions for carriage on open video systems.

Moreover, with the minor exception of leased access, incumbent cable operators have no obligation to disclose their contracts. Also, upon a local exchange carrier's deployment of an open video system in an area, the incumbent cable operator will no longer be required to file upper tier programming contracts with the Commission. Even now, those contracts are not publicly disclosed. Under these circumstances, the mere suggestion of a contract disclosure requirement for new market entrants is nothing short of astounding. Such disclosure would serve only to position open video system operators' rates as an "umbrella" for their competitors.

No rule is needed in this area beyond the requirement stated in Section 653. The Commission should, however, provide guidance in notes regarding the approach it will take in complaint proceedings. Such notes should indicate that

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[41] Id. ¶ 28.

[42] See *First Report and Order (FCC 80-269), in the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore,* CC Docket No. 79-252, 85 FCC2d 1 (1980) ¶88.

open video system operators will be permitted to place reasonable conditions on video programming providers seeking channels on the system (including, but not limited to, requirements that providers have legal access to programming, meet the system's technical standards, and meet the system's service schedule; requirements regarding scrambling or blocking of obscene or indecent programming; indemnification of the operator for copyright and intellectual property claims as to carried content; deposits; and minimum contract periods). The Commission should make it clear that operators are required to deal only with parties that have contractual access to programming and that operators have no obligation to accommodate a mere request for capacity. Otherwise, capacity on systems could be warehoused and held for speculation by parties that have no prospect of using it to deliver programming. Finally, the notes should establish a preference for voluntarily negotiated arrangements with video programming providers. All such arrangements with unaffiliated parties should be presumed just and reasonable regardless of how they may differ from one another.

C. Channel Sharing[43]

The Commission's conclusion that channel sharing decisions should be left to the discretion of open video system operators is the only correct reading of Section 653.[44] Operators will require sharing only when doing so makes

[43] Notice ¶¶ 35-41.

[44] Id. ¶ 37.

good business sense from both technical and market perspectives. Thus, the Commission should adopt only a rule that permits channel sharing in the broad terms of the statute. More detailed rules cannot possibly reflect the variety of circumstances in which operators may elect to require channel sharing or the variety of ways in which they may provide subscribers with "ready and immediate access" to shared channels. The questions raised by the Notice cannot be addressed adequately without reference to the particular facts of particular systems.[45]

D. Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity[46]

In general, there is no reason for these rules to be applied to open video systems that cross multiple communities any differently than they are applied to cable systems that cross multiple communities. The primary difference between cable systems and open video systems that these rules should reflect is that multiple parties will be responsible for selection of programming on open video systems. The video programming provider responsible for selecting programming, not the open video system operator, should be held legally responsible for compliance with these rules as to that programming, including the responsibility to indemnify the operator if the video programming provider's failure to comply causes loss to the operator. Open video system operators and

[45] As previously stated, shared channels should not be counted as channels selected by the operator for purposes of determining whether the operator has selected programming on more than one-third of the activated channel capacity.

[46] Notice ¶¶ 42-46.

video programming providers should be permitted to handle the details of such compliance in their contracts.

E. Information Provided to Subscribers[47]

The Commission should minimize its regulations by adopting a rule that merely restates this requirement as expressed in Section 653, with one exception: The Commission should clarify that this requirement applies only to information provided to all subscribers over the system itself and does not apply to information provided over or in connection with the channels over which the operator, its affiliates, or other video programming providers have exclusive editorial control. Operators should be free to determine how best to comply with this requirement on each system. The potential variety in legitimate approaches to system navigation, menus, the provision of programming information, and other matters related to program selection, to the extent the operator chooses to make them available, makes any other approach unworkable.

F. Applicability of Certain Title VI Provisions[48]

1. Public, Educational, And Governmental Access[49]

Section 653(c)(2)(A) gives the Commission great latitude to fashion an approach to PEG access on open video systems that keeps operators free from local franchise regulation as Congress intended. To ensure such freedom, the

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[47] Id. ¶¶ 47-51.

[48] Id. ¶¶ 52-62.

[49] Id. ¶¶ 57-58.

Commission must affirm that operators are not required to negotiate PEG access or related matters with state or local authorities and must not tie operators' duties directly to regulation of individual cable operators.[50] Instead, the Commission must prescribe regulations that "to the extent possible impose obligations that are no greater or lesser than the obligations" of cable operators. In that regard, Section 611 requires only that channel capacity be made available for PEG access. Therefore, the Commission's objective should be to ensure that open video system operators provide PEG access that is comparable to that generally in use in the open video system service area, not to mirror requirements imposed by individual franchising authorities on specific cable operators. Moreover, because open video systems will likely cross multiple franchise boundaries and serve portions of numerous franchise areas, each open video system operator must have the flexibility to determine based on technical considerations and market conditions the manner of meeting PEG access requirements.

The Commissions' general approach to regulating PEG access should be like that which the Joint Parties have urged for other open video system requirements: Adopt a general rule that requires operators to provide PEG access that overall is comparable to that generally in use in the open video system service area and resolve specific issues in the dispute resolution process.

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[50] The Joint Parties do not mean by this proposal or their proposal regarding compliance with "must-carry" requirements to suggest that they do not share the cable industry's First Amendment objections to those requirements.

Such an approach would permit operators to satisfy Section 653's PEG access requirement by any reasonable means, including, but not limited to, retransmission of incumbent cable operators' PEG feeds or time-sharing of channels by PEG entities. It also would permit operators to satisfy PEG access requirements by making capacity available to carry the average amount of PEG programming carried by cable operators in the service area. This approach would give operators a reasonable time to reflect changes in the PEG access provided generally in open video system service areas.

Open video system operators should not be required to dedicate entire channels to individual PEG entities. They should be permitted to make PEG access available to qualified users on a first-come-first-served basis, by lottery, or any other reasonable mechanism. PEG programmers must be responsible for making their programming feed available for delivery to the open video system headend.

2. "Must Carry" And Retransmission Consent[51]

In general, "must-carry" and retransmission consent rules should apply to open video systems in the same way they apply to cable systems. In order for open video systems to be competitively viable, the Commission should require broadcasters to offer consent for retransmission of their signals by open video system operators or their affiliates on the same terms and conditions as such signals are made available for retransmission by cable operators.

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[51] Notice ¶¶ 59-60.

3. Program Access[52]

At a minimum, the program access rules for open video system providers should be equivalent to those for the cable industry, so that open video systems have the opportunity to compete with incumbents on a level playing field.

G. Non-LECs as Open Video System Operators[53]

As stated previously, it is extremely important, as a test of the reasonableness of the Commission's open video system rules and for the sake of competitive neutrality, to extend to other providers of cable service the option of providing open video systems. The Commission should provide cable operators a genuine opportunity to convert to open video systems and operate them under the same rules as common carriers' open video systems. The ambiguity created by Section 653(a)(1)'s use of the term "cable service" with respect to carriers and the term "video programming" with respect to others can be reasonably resolved in favor of extending the open video system option to all providers of cable service. An interpretation that limits cable operators and others to being video programming providers on open video systems operated by carriers would be inconsistent with the pro-competitive intent of Section 653.

1. Bundled packages[54]

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[52] Id. ¶ 61.

[53] Id. ¶¶ 63-66.

[54] Id. ¶66.

The Notice correctly acknowledges the value that bundled packages of telephone services, cable services, and data transmission can bring to consumers. There is growing evidence that such packages will result from competition in communications markets.[55] The Commission should expressly recognize that such packaging is in the public interest, but should not adopt rules. Rather, the Commission should eschew rules and let the market determine the manner and degree of service bundling options offered to customers. Competitive markets require regulatory forbearance.

2. Joint Marketing[56]

The 1996 Act leaves the door wide open for the integrated provision of video programming and telephone services, including the joint marketing of such services. The 1996 Act's treatment of joint marketing of long distance and telephone services demonstrates that Congress was aware of joint marketing issues.[57] The 1996 Act's total silence on joint marketing of telephone and video programming services sends a strong message to the Commission: Do not interfere with the operation of the market.

H. Certification Process[58]

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[55] For instance, AT&T recently announced that it will begin selling DIRECTV® satellite entertainment service and DSS® equipment to consumers. AT&T said it will, among other things, offer free pay-per-view movies to customers that sign up for AT&T long distance service and DIRECTV®. AT&T Press Release, March 25, 1996.

[56] Notice ¶ 66.

[57] 1996 Act § 271(e)(1) and 272(g).

[58] Notice ¶¶ 67-70.

The Commission's certification process must be streamlined if the Commission is to approve or disapprove certifications within 10 days, as the 1996 Act mandates. As proposed in the Appendix, the Commission should require only that a certificate provide information comparable to that required in registration certificates for new cable systems[59] and state that the operator will comply with the Commission's rules. The certification process must not become an opportunity for competitors to delay entry.

Any requirement for pre-certification filings or compliance activity would clearly violate the congressional intent to provide for an expedited process that avoids the pitfalls of the Commission's video dialtone procedures. Further, pre-certification requirements could create the untenable situation in which an operator and its investors require the business certainty provided by certification before engaging in implementation activity but are required by the Commission to complete significant implementation before qualifying for certification.

There is no need for the Commission to take any action regarding cost allocation prior to certification or to impose cost allocation requirements as a condition for certification. The Commission already has rules in place in Part 64 that fully accommodate the joint provision of common carrier and non-common carrier services. Common carriers must comply with Part 64 before providing video programming services on either an open video system or a cable system.

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[59] *See* 47 C.F.R. § 76.12.

The addition of a cost allocation requirement to the certification process would be redundant.

The Commission must state clearly what the effect of certification is. As previously stated, the only substantial incentive for establishing open video systems instead of cable systems is the ability to avoid local franchise negotiations and attendant local regulation. Therefore, the rules must clearly provide that local franchising authorities are not permitted to exercise any authority over establishment or operation of open video systems that would enable them to delay or impede market entry in any manner or otherwise burden the operation of open video systems. By not permitting state or local authorities to require franchises or otherwise regulate open video systems, Congress retained for itself and the Commission exclusive authority to regulate open video systems. The Commission, therefore, should preempt any state or local requirements that would burden or delay the deployment of or discriminate against open video systems.[60]

I. Dispute Resolution[61]

The Appendix proposes rules for dispute resolution. These rules are modeled after the Commission's rules for adjudicating disputes relating to program access.[62] This is the process by which the Commission should resolve

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[60] The need for such preemption to prevent state and local governments from frustrating the intent of Congress with respect to open video systems is comparable to that which justifies the Commission's preemption of local zoning regulation of satellite earth stations. *See Report and Order* (FCC 96-78), IB Docket No. 95-59, released March 11, 1996.

[61] Notice ¶¶ 71-72.

[62] *See* 47 C.F.R. § 76.1003.

specific issues regarding compliance with the rules. The rules should extend presumptions of lawfulness to operators and impose sufficient burdens of proof on complainants to discourage the filing of insubstantial complaints. This can be accomplished by adopting the notes proposed in the Appendix.

Conclusion

The Commission has asked also how it can in this rulemaking advance Congress' goal to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability". The surest way for the Commission to further that goal is to adopt the flexible, pro-competitive rules and the dispute resolution process that these comments have proposed. By making operation of open video systems a genuinely attractive alternative to operation of cable systems, the Commission can encourage the competitive entry and investment that local franchising processes often discourage.

Respectfully submitted,

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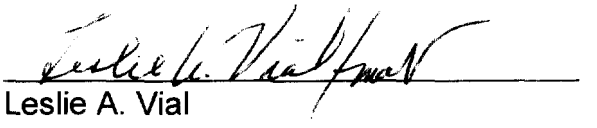

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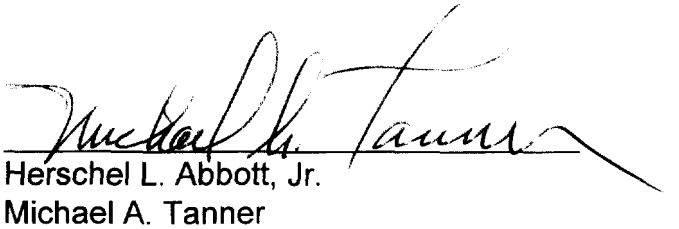

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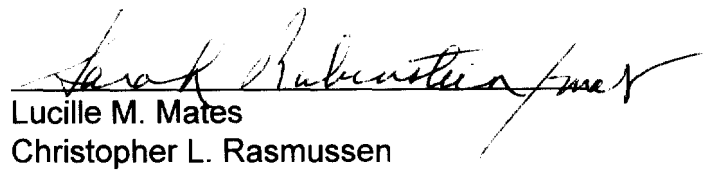

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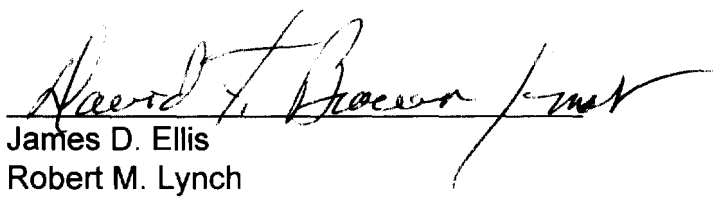

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APPENDIX

Proposed Open Video System Rules

Part __ of Title 47 of the Code of Federal Regulations is created as follows:

Part __ -- Open Video Systems.

§ __.__ Purpose.

The rules and regulations set forth in this part provide for the certification of open video systems and for their operation in conformity with standards for carriage of television broadcast signals, syndicated program exclusivity, access channels, and related matters.

§ __.__ Definitions.

(a) *Open video system.* A facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part.

(b) *Open video system operator ("operator").* Any person or group of persons who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system.

(c) *Subscriber.* A member of the general public who receives video programming distributed over an open video system and does not further distribute it.

(d) *Video programming provider.* Any person or group of persons who has the right under the copyright laws to select and contract for carriage of specific video programming on an open video system.

(e) *Affiliate.* When used in relation to any person, another person who owns or controls, or is owned or controlled by, or is under common ownership or control with, such person.

(f) *Person.* An individual, partnership, association, joint stock company, trust, corporation or the like, or governmental entity.

(g) *Activated channels.* This term shall have the same meaning as provided in the cable television rules, 47 C.F.R. § 76.5(nn).

(h) *Cable service.* This term shall have the same meaning as provided in the cable television rules, 47 C.F.R. § 76.5(ff).

§ __.__ Application.

This part shall apply to any person that provides video programming service to subscribers through an open video system certified by the Commission. Except as

otherwise provided in this part, neither the provisions of part 76 nor any other rule or regulation of the Commission shall apply to the operation of open video systems.

§ __.__ Certificates of compliance.

(a) In order to qualify for the reduced regulatory burdens applicable to open video systems, a person proposing to operate an open video system shall certify to the Commission that it will operate such open video system in compliance with this part.

(b) The Commission shall publish notice of the receipt of any such certificate of compliance and shall act to approve or disapprove any such certification within 10 days after receipt of such certification. In the absence of any action by the Commission approving or disapproving a certificate of compliance, such certificate shall be deemed to be approved on the 10th calendar day after receipt by the Commission.

(c) *Contents.* A certificate of compliance for an open video system shall include the following information:

(1) The legal name of the proposed open video system operator, entity identification or social security number, and whether the operator is an individual, private association, partnership, or corporation. If the operator is a partnership, the legal name of the partner responsible for communications with the Commission shall be supplied;

(2) The assumed name (if any) used by the open video system operator for doing business in the community(ies);

(3) The mailing address, including ZIP code, of the open video system operator and the telephone number to which all communications are to be directed;

(4) The date the open video system is scheduled to commence providing service to subscribers;

(5) The name of the community(ies) or area(s) to be served by the open video system and the county(ies) in which it is located;

(6) Certification that the proposed open video system will be operated in compliance with this part.

(d) *Effect of Commission approval.* Commission approval of a certificate of compliance shall preclude any state or local authority from taking the following actions: (i) requiring an open video system operator that has existing authority to place any kind of communications facilities on public rights-of-way to obtain additional authorization for the use of such rights-of-way for the construction of an open video system; and (ii) imposing on an open video system operator any requirement or condition with respect to construction or operation of the open video system over public rights-of-way that is any more burdensome than requirements or conditions imposed on other entities using such public rights-of-way for interstate communications facilities.

APPENDIX
Proposed Open Video System Rules

§ __.__ Incorporation of selected provisions of part 76

The following provisions of part 76 that apply to cable operators shall also apply to open video system operators: Subpart E *[Equal Employment Opportunity Requirements]*; Subpart O *[Competitive Access to Cable Programming]*; Subpart Q *[Regulation of Carriage Agreements]*; § 76.503 *[National subscriber limits]*; § 76.504 *[Limits on carriage of vertically integrated programming]*; §§ 76.610, 76.611, 76.613, 76.614, 76.615, 76.616, and 76.617 *[relating to signal leakage and harmful RF interference]*; and § 76.981 *[Negative option billing]*.

§ __.__ Carriage on open video systems.

(a) Except as required pursuant to the incorporation of subpart D of part 76 into this part, an operator of an open video system shall not unreasonably discriminate among video programming providers with regard to carriage on its system and shall provide such carriage pursuant to rates, terms, and conditions that are just and reasonable and are not unjustly or unreasonably discriminatory.

Note 1: When demand for carriage exceeds capacity in an established open video system, the operator is not required, and it will not be considered discrimination for the operator to refuse, to reduce its capacity in order to accommodate carriage requests from unaffiliated programmers until the end of the current contract period, and in any case, the operator and/or its affiliate will not be required to reduce its capacity to less than one-third of the total system capacity.

Note 2: If the operator has selected programming for no more than one-third of the total system capacity, it will not be considered discrimination for the operator to refuse requests for carriage which exceed the capacity of the system.

Nothing in this subsection, however, shall preclude:

(1) The imposition on video programming providers of reasonable requirements for creditworthiness and financial stability.

Note 1: Open video system operators are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability. Operators are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

Note 2: Open video system operators are permitted to require security deposits from video programming providers.

Note 3: Open video system operators are permitted to require video programming providers to agree to minimum contract periods for carriage of their video programming.

(2) Requirements that video programming providers provide evidence concerning their legal access to the programming such providers propose for carriage on the open video system prior to execution of the carriage agreement with the open video system operator.

(3) Requirements that video programming providers provide evidence concerning their ability to meet certain technical standards in order to be provided carriage on the open video system.

(4) Requirements that video programming providers provide reasonable assurances to the open video system operator that such providers will be able to provide programming on its assigned channels in a timely manner.

Note: For example, open video system operators may require that providers of video programming be prepared to offer programming on the open video system within a specified period after the operational date of the system, or within a specified period after channel capacity is made available to the programmer, unless otherwise agreed in the carriage contract.

The listing of certain permissible requirements in this subsection is not intended to preclude other requirements that may be commercially reasonable.

(b) If demand exceeds the channel capacity of an open video system, neither the operator of the system and its affiliates nor any other video programming provider shall select the video programming services for carriage on more than one-third of the activated channel capacity of such system, provided, however, that there shall be no limit on the number of channels on such system that the operator, its affiliates, or another video programming provider may offer to provide directly to subscribers.

Note 1: Open video system operators may limit the capacity made available to any single unaffiliated video programming provider to an amount no greater than the amount of channel capacity allocable to the operator and/or its affiliates.

Note 2: The open video system operator and its affiliate may select programming for one-third of the total activated channels on the open video system. Channels reserved for public, educational, and governmental carriage, for must-carry or retransmission consent carriage, or for shared channel carriage (to the extent that an open video system operator permits or requires shared channel carriage) are included in "total activated channels" for the purposes of calculating the one-third of such channels for which the open video system operator is allowed to select programming but are not included in the one-third of capacity for which the open video system operator is permitted to select programming.

(c) An open video system operator or its affiliate is not limited with respect to the number of channels that it offers or markets directly to subscribers.

Note: The open video system operator may offer or market directly to subscribers all programming selected by it and/or its affiliate as well as programming on the open video system selected by unaffiliated video programming providers.

(d) An open video system operator is permitted but is not required to adopt a plan to carry on only one channel any video programming service that is offered by more than one video programming provider (including the operator's video programming affiliate). If an open video system operator adopts a channel sharing plan, it may administer the channel sharing arrangements or choose another entity to

administer such arrangements. Shared channels must be readily and immediately available to all subscribers.

Note: Shared channels will be included in the total channel capacity of the open video system for purposes of calculating the one-third of activated channels for which the open video system operator and/or its affiliate is permitted to select video programming when demand for carriage exceeds the capacity of the system, but shared channels will not be included in the one-third of total channel capacity to which the operator and/or its affiliate are limited in the selection of programming.

(e) Open video system operators may not unreasonably discriminate in favor of the operator and/or its affiliate with respect to material or information (including advertising) provided to subscribers for the subscribers' use in selecting programming on the open video system. Open video system operators must ensure that video programming providers and/or copyright holders are able to identify suitably and uniquely their programming services to subscribers. Open video system operators may not change or alter any such identification that is transmitted as part of the programming signal. Open video system operators are not permitted to omit television broadcast stations or other video programming provided by unaffiliated entities on the open video system from any basic navigational device, guide, or menu. Nothing in this section prohibits an operator or its affiliate from negotiating mutually agreeable terms and conditions with over-the-air broadcast stations and other unaffiliated video programming providers to allow consumer access to their signals on any level or screen of any gateway, menu, or other program guide, whether provided by the operator or its affiliate.

Note: Nothing in this rule requires an operator or its affiliate to provide any navigational device, guide, or menu. The requirements in this rule apply only to information provided by the open video system operator to all subscribers over the open video system itself and does not apply to information provided over the channels over which the operator, its affiliate, or other video programming provider has exclusive editorial control.

(f) *Public, educational and governmental access.* An open video system operator shall designate capacity for public, educational, or governmental use. An operator's provision of such capacity shall be subject to the following regulations, but shall not be subject to regulation by any franchising authority:

(1) An operator shall make capacity available for public, educational, or governmental access in a manner that is comparable to that generally in use in the open video system service area.

(2) An operator shall not be required to dedicate entire channels to any particular entity in conjunction with public, educational, or governmental access.

(3) An operator shall make public, educational, and governmental access available to qualified users on a first-come, first-served basis, by lottery, or by any other reasonable mechanism.

(4) An operator will be given a reasonable amount of time to make system adjustments required to accommodate changes in public, educational, and governmental access obligations.

(5) An operator may use channel capacity designated for public, educational, or governmental use for other purposes if such channel capacity is not being used for the purposes designated.

(6) An operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this subsection, provided, however, that any operator may prohibit the use on its system of any channel capacity designated for public, educational, or governmental use which contains obscene material, indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. An operator may require any access user, or access manager or administrator, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

§ __.__ Carriage of Television Broadcast Signals.

The provisions of Subpart D (*Carriage of Television Broadcast Signals*), with the exception of §76.67, that apply to cable operators shall apply to open video system operators.

§ __.__ Network nonduplication protection and syndicated exclusivity.

(a) Any person that selects video programming services for distribution over an open video system shall, with respect to the programming services that it has selected, be subject to the requirements of §76.67, §§ 76.92 *et seq.*, and §§ 76.151 *et seq.*, applicable to cable operators.

(b) An open video system operator shall be responsible for compliance with such requirements only for the programming services it has selected.

(c) An operator may undertake pursuant to its carriage contracts with video programming providers to provide services that enable such parties to comply with the requirements of this section. Such contracts may require video programming providers to indemnify the operator against any claims or losses resulting from the video programming provider's failure to comply with this section.

§ __.__ Fees.

(a) An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service lawfully imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under 47 U.S.C. § 542. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area. For purposes of this subsection, gross revenues shall include revenues of the operator only for the provision of cable service and shall exclude any federal, state, city or other tax, fee, or surcharge imposed upon subscribers, subscriber deposits on equipment owned by the open video system operator, charges billed to subscribers but not collected, refunds to subscribers, revenues collected from video programming providers for carriage and for any services provided by the operator in connection with such carriage, and any fees paid pursuant to this subsection in lieu of franchise fees.

(b) An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee under this subparagraph as a separate item on the bill.

§ __.__ Dispute resolution.

(a) *Complaints.* Any provider of video programming aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this part or in Section 653 of the Communications Act (47 U.S.C. § 653) may commence an adjudicatory proceeding at the Commission. The Commission shall resolve any such dispute within 180 days after the filing of a complaint. If the Commission fails to issue an order resolving a dispute within such time period, the open video system operator shall not be liable for any damages accruing after the running of said 180 days.

(b) *Alternate dispute resolution.* An open video system operator may provide in its contracts with video programming providers that any dispute must be submitted to arbitration, mediation, or any other commercially reasonable alternative method for dispute resolution prior to submission of a complaint to the Commission. The Commission will not act on any complaint until the parties to such a contract have fully complied with such contractual provisions unless the party submitting the dispute to the Commission demonstrates by a preponderance of the evidence that the other party has acted in bad faith to defeat the contractual procedures for alternate dispute resolution. The period of time that the parties are involved in alternate dispute resolution shall not be counted in the 180-day period established in subsection (a) of this subpart.